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No. 80-812

IN THE

Supreme Court of the United States

October Term, 1980

THE MESCALERO APACHE TRIBE,
Petitioner,

v.

FRED L. O'CHESKEY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Respondents oppose the granting of certiorari in this case for the reasons set out below.

QUESTION PRESENTED

In Respondents' view, the question presented is whether New Mexico's gross receipts tax on the receipts of a non-Indian construction contractor working for an Indian tribe is pre-empted when there is no comprehensive federal scheme regulating the construction contractor's activities.

STATEMENT OF THE CASE

The focal point of this case is the Mescalero Apache Tribe's $23 million hotel and resort complex designed to attract non-Indians to the facilities. *Pet.*, 11c-12c. The complex was constructed for the Tribe by non-Indian construction contractors. *Pet.*, 11b-12b. New Mexico's tax is on the receipts of these construction contractors.[1] *Pet.*, 1c-2c.

Petitioner's statement significantly omits the fact that the Economic Development Administration grants, which were the principal source of funding for the construction of the Tribe's tourism hotel,[2] were not given to the Tribe as part of a special program for Indian tribes. *Pet.*, 6c. The Economic Development Administration provides monies for a wide variety of development projects, and the majority of its grants are made to entities other than Indian tribes. *Pet.*, 6c.

Furthermore, the regulations of the Economic Development Administration expressly permit inclusion of the amount of state taxes as part of the total construction cost, *Pet.*, 6c, including "passed-on" New Mexico gross receipts taxes on the construction contractors.

The construction contractors that built the resort complex are corporations existing under New Mexico, Arizona and Texas law. *Pet.*, 2c, 8c. They are all licensed by their home states, *Pet.*, 9c, and each of them has done construction work in New Mexico other than the resort complex for the Tribe. *Pet.*, 8c-9c.

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1. The legal incidence of New Mexico's gross receipts tax is on the seller, here the contractors, even though its economic burden may be passed on to the buyer. *United States v. State of New Mexico*, 581 F.2d 803 (10 Cir. 1978).

2. The Tribe furnished no capital for the construction of the hotel, *Pet.*, 11c, all of it coming in the form of grants or loans from the federal government.

Although their construction work took place on the Reservation, *Pet.*, 6c, the construction contractors and their non-Indian employees departed the Reservation at the end of each working day. *Pet.*, 15c.

With respect to the Indian trader licenses issued to the construction contractors, Petitioner also fails to note that the District Court, after considered discussion,[3] declared that the Secretary of the Interior, in authorizing and granting Indian trader licenses to the construction contractors, acted beyond the scope and intent of 25 U.S.C. §§261-264. *Pet.*, 20b. Neither the Tribe nor the Secretary of the Interior appealed from this judgment.

REASONS FOR DENYING THE WRIT

The primary reason to deny the writ is that the Tenth Circuit's decision is correct. The heart of Petitioner's argument is that New Mexico's tax is preempted by a federal regulatory scheme applicable to the non-Indian construction contractors' activities. It relies exclusively on this Court's recent opinions in *White Mountain Apache*[4] and *Central Machinery*,[5] all but ignoring *Washington v. Confederated Tribes of Colville Reservation*, ____ U.S. ____, 100 S.Ct. 2069 (1980), which squarely supports New Mexico's ability to tax the contractors' activities. There this Court held that Washington could properly tax reservation sales of cigarettes, even when the impact of the tax on the tribal enterprises was crippling. New Mexico's tax, by contrast, carries no such comparable impact.

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3. Found at *Pet.*, 4b-7b.

4. *White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. 2578 (1980).

5. *Central Machinery Co. v. Arizona State Tax Comm'n*, ____U.S.____, 100 S.Ct. 2592 (1980).

White Mountain Apache is quite clearly inapposite. The taxpayer in *White Mountain Apache* was engaged in logging on the reservation. Every significant aspect of its logging activities was detailed by federal government regulations. The holding of this Court was that

> ". . . the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their . . . taxes . . . for operations . . . within the reservation. There is no room for these taxes in the comprehensive federal scheme."
>
> 100 S.Ct. at 2586.

By contrast, the details of construction operations of the contractors on the Tribe's Reservation were unregulated by the federal government. The construction contractors' building activities were subject to no BIA regulatory scheme, nor in fact did any agency of the United States perform any supervisory role of any substance as to construction. This significant difference between the instant case and *White Mountain Apache* makes it clear that the Tenth Circuit's decision is unassailable.

It is true that the Tribe's resort complex was funded almost entirely by federal grants from the Economic Development Administration, an agency of the United States. *Pet.*, 6c. It is also true that the contractors were approved by the Economic Development Administration, *Pet.*, 7c, but the Economic Development Administration regulatory scheme, under which this money was given to the Tribe, unambiguously recognized state taxes as a part of the total construction cost. *Pet.*, 6c. There can hardly be any preemption if the federal regulatory scheme itself expressly allows state taxes such as New Mexico's. The Tribe's status as a result of receiving an EDA grant is no different than the status of any of the thousands of that federal agency's non-Indian beneficiaries.

Nor do recitals of a general federal policy favoring Indian self-determination aid the Tribe. The laudable but irrelevant pieces of legislation cited by the Tribe, *Pet.*, 10-11, do not add up, either singly or collectively, to a scheme of regulation of building construction on a reservation. *Washington v. Confederated Tribes of Colville Reservation*, ____ U.S. ____, 100 S.Ct. 2069, 2082 (1980).

White Mountain Apache, on closer examination, actually supports New Mexico's tax. Arizona's interest in collecting its taxes was weak. Here, as in the *Colville* case, the interest of the state is strong: New Mexico seeks to assess its gross receipts taxes against the contractors "in return for governmental functions it performs for those on whom the taxes fall." *White Mountain Apache*, 100 S.Ct. at 2587. Contrary to *White Mountain Apache*, where the taxpayer's presence in the state was limited to the confines of the reservation, the contractors here all had performed other work in New Mexico; they were present generally in the state, for they left the Reservation after every workday. *Pet.*, 8c, 9c, 15c. They were thus the recipients of state services, *Pet.*, 15b, for which the state may seek a fair return. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940). Yet another point of distinction: the taxes in *White Mountain Apache* were levied to compensate Arizona for services it never provided to the contractor. General revenues from New Mexico's gross receipts tax, however, make possible not only the benefits afforded the contractors, but also the services the state provides for tribal members living on the Mescalero Reservation. *Pet.*, 5c.

Finally, the District Court's judgment that the Secretary of the Interior acted beyond the scope and intent of the Indian trader licensing statute, 25 U.S.C. §§261-264, in granting licenses to the construction contractors, *Pet.*, 19b-20b, remains unchallenged by either the Tribe or the United States. Both

parties are bound by that decision and may not seek to avoid its effect now. *Montana v. United States*, 440 U.S. 147 (1979). Moreover, the Indian trader statutes, and consequently the holding of *Central Machinery*, do not apply here. That legislation is concerned only with the sale of "goods" or "merchandise," not with the sale of the contractors' construction services. See *Pet.*, 13b-14b.

A second reason for denying the writ is the lack of national importance of this case. Respondents agree that many questions of state jurisdiction with respect to activities on an Indian reservation are important, and that this case is important to the Tribe. However, the particular question presented here is not of great national importance. Petitioner's invocation of a supposed adverse effect of the Court of Appeals' decision on "nationwide tribal development efforts" finds no evidentiary support in the record, and as a matter of fact is simply not true. Most western states[6] do not tax the proceeds from construction, much less when the construction takes place on Indian reservations. Thus, the situation presented to the Court by this Petition has little if any import for other states or tribes.

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6. Only three other western states tax construction activity: Arizona, Ariz.Rev.Stat. §42-1310.2(i); South Dakota, S.D.C.L. 1967 §10-46A *et seq.*; and Washington, Wash.Rev.Code Ann. §§82.04.050, 82.04.250, 82.04.280.

CONCLUSION

Because the Tenth Circuit reached the correct result, and because the petition does not present an issue of national significance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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